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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 517

RICHARD A. McGEE, Director, California Department of Corrections, and ROBERT A. HEINZE, Warden, California State Prison for Men, at Represa, California,
Petitioners,

v.

JAMES NELS EKBERG,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the district court (R. 30-31) is not reported. The original opinion of the court of appeals (R. 40-43) and the dissenting opinion is reported at 191 F. 2d 625. The opinion of the court of appeals, as amended, and the dissenting opinion is reported at 194 F. 2d 178.

JURISDICTION

The judgment of the court of appeals was entered August 31, 1951 (R. 43-44). A petition for rehearing was filed on October 1, 1951, which was denied by the court of appeals on October 25, 1951 (R. 44). The petition for certiorari was filed January 8, 1952, and was granted March 10, 1952. The jurisdiction of this court rests on 28 U. S. C. 1254(1), 28 U. S. C. 2101(c). See, also, Rule 38(5)(b).

QUESTION PRESENTED

Whether a federal district court must entertain a petition for writ of habeas corpus by one confined under a final judgment of a state court where the petition on its face alleges that the petitioner has exhausted his state remedies but where the petition fails to show a substantial federal question and exceptional circumstances of peculiar urgency, or if it may deny leave to file such petition without a hearing?

STATUTE INVOLVED

"Section 2254. State custody; remedies in State courts

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances

rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

STATEMENT OF THE CASE

Prior State Proceedings

Respondent was convicted in the Superior Court of the State of California, in and for the County of San Diego, on two counts: one, issuing a check without funds with intent to defraud; and second, possession of a firearm capable of being concealed upon the person by one previously convicted of a felony. This judgment was affirmed on appeal by the Fourth District Court of Appeal of the State of California in the case of *People* v. *Ekberg,* 94 C. A. 2d 613, 211 P. 2d 316. A petition for rehearing was denied. A petition for hearing in the California Supreme Court was denied December 12, 1949 (*People* v. *Ekberg,* 94 C. A. 2d, 613, 619, 211 P. 2d 316). Certiorari was not sought. Later, a petition for habeas corpus was filed in the California Supreme Court, numbered Crim. 5086, which was denied without opinion on March 16, 1950. An application to this court for writ of certiorari was denied without opinion on May 29, 1950 (*Ekberg* v. *California,* 339 U. S. 969, 94 L. Ed. 1377, 70 S. Ct. 986).

Proceedings in the Courts Below

Respondent herein (applicant) sought to file a petition for writ of habeas corpus with Hon. William Denman, Chief Judge of the U. S. Circuit Court of Appeal for the Ninth Circuit. Judge Denman, pursuant to 28 U. S. C. 2241(b) transferred said application to the U. S. District Court for the Northern District of California (R. 30). The Honorable Dal M. Lemmon, Judge of said court, by his order filed July 31, 1950, denied to respondent the right to file the petition in forma pauperis on the ground that there was nothing alleged therein which presented "exceptional circumstances of peculiar urgency" which entitled him to the issuance of the writ even though he had alleged exhaustion of state remedies (R. 30-31). A certificate of probable cause was granted (R. 34). The record was filed in the court of appeals and upon the applicant's request, counsel was appointed to represent him (R. 20). Thereafter briefs were filed, the matter argued orally, and after submission the court of appeals issued its opinion reversing the judgment of the district court and ordered the district court to give the matter its further consideration (R. 40-44). A petition for rehearing was filed within rule time and was denied by said court (R. 44). A petition for writ of certiorari was filed with this court on January 8, 1952 (R. 44). Thereafter and on January 30, 1952, the court of appeals amended its opinion to hold that under California law the state corrective process

was not inexhaustible (R. 42). Certiorari was granted by this court on March 10, 1952 (R. 44).

In his petition for writ of habeas corpus which was denied by the Federal District Court, the applicant attacked the state judgments under which he was confined, on the following grounds:

(1) That the trial court lacked jurisdiction as his prior conviction was erroneously charged;
(2) That there was insufficient evidence to justify his conviction of issuing a check without sufficient funds pursuant to Sec. 476a of the Penal Code of the State of California, and insufficient evidence before the magistrate to justify his having been held for trial;
(3) That the joinder of the two separate informations for trial resulted in a denial to him of due process of law;
(4) That he was deprived of counsel of his own choice and his counsel was grossly incompetent;
(5) That certain defense witnesses demanded by him were not subpoenaed, although he had so requested his counsel;
(6) That he was twice placed in jeopardy for the same offense by reason of the joinder of offenses for trial and the fact that the sentences were ordered to run consecutively;
(7) That he was denied an opportunity to appear and personally argue his cause on his appeal in the District Court of Appeal of the State of California, in and for the Fourth Appellate District, or to have counsel appointed to represent him on such oral argument which resulted in a lack of due process of law. (R. 1-20)

In denying the applicant leave to file this petition for writ of habeas corpus in forma pauperis, Hon. Dal M. Lemmon, United States District Judge, stated:

> "It appears that the defendant was convicted of two charges in the state court and that the judgment of conviction has become final. He is now serving under the judgment two consecutive sentences in a California State Prison.
>
> "He has heretofore applied for the writ of habeas corpus to the Supreme Court of the State of California, apparently upon the same grounds as are alleged in the instant petition. The Supreme Court of the State of California has denied him relief under his petition to that court. Thereafter he applied for certiorari to the United States Supreme Court. The United States Supreme Court had denied that application. He had therefore exhausted his state remedies. Where a state court has considered and adjudicated the merits of a petitioner's contention a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated. The State of California accords remedies which give due process of law and there is nothing alleged which presents 'exceptional circumstances of peculiar urgency' which entitle him to the issuance of the writ. Ex parte Hawk, 321 U. S. 114; ex rel. *Kennedy* v. *Tyler*, 269 U. S. 13. This being the situation this court should deny the right to file the petition in forma pauperis and it is so ordered. *Huffman* v. *Smith*, 172 F. 2d 129." (R. 30-31)

The majority opinion of the circuit court of appeals held: "We think the district court erred in holding exceptional circumstances must be shown before the

federal court or judge may be called upon to exercise the discretion described in *Huffman* v. *Smith*, supra, 172 F. 2d 130." (R. 40-43)

The dissenting opinion of Circuit Judge Healy contained the following language:

> "The appeal is from an order denying an application for leave to file a habeas corpus petition *in forma pauperis*. Such an application is addressed to the discretion of the trial court, Huffman v. Smith, 9 Cir., 172 F. 2d 129, Tate v. People, 9 Cir., 187 F. 2d 98, and I am unable to see that the court abused its discretion. The petition for the writ presented no question of substance. Most of the points raised had been fully considered by the California court on appeal from the judgment of conviction, People v. Ekberg, 94 Cal. App. 2d 613, 211 P. 2d 316, and their lack of merit exposed. In respect of points not urged on the direct appeal there is likewise no substantial showing of the denial of a federal right. I would affirm the judgment." (R. 43)

SUMMARY OF ARGUMENT

The petition for writ of habeas corpus on its face did not present a substantial federal question nor disclose extraordinary circumstances of peculiar urgency. The action of the district court in denying applicant leave to file the writ in forma pauperis was proper. The action of the ninth circuit court in reversing the district court and in holding that after an applicant has exhausted his state remedies it is not necessary for him to show "exceptional circumstances of peculiar urgency" is not in accord with the provisions of

Section 2254, Title 28 U. S. C., nor is it in accord with the rationale of *Darr* v. *Burford,* 339 U. S. 200, or *Ex parte Hawk,* 321 U. S. 114. This decision of the ninth circuit court impedes the orderly administration of justice and fails to give any weight to the proceedings in the state court or to the denial of certiorari by this court of the highest state court's decision in the same matter.

ARGUMENT

I. The Petition for Writ of Habeas Corpus on Its Face Does not Present a Substantial Federal Question nor Disclose Extraordinary Circumstances of Peculiar Urgency. The Holding of The United States District Court to This Effect Was Correct and the Reversal Thereof by the Ninth Circuit Court Erroneous

The district court in the instant proceeding followed the procedure set forth in the case of *Dorsey* v. *Gill,* 148 F. 2d 857 (cert. den. 325 U. S. 890, 89 L. Ed. 2003) which case suggested the procedures to be adopted by federal courts upon an application for writ of habeas corpus, namely: "(1) When a petition is presented to a judge with request for leave to file it, the judge may, if the petitioner is not entitled to a writ, deny leave to file it; * * * " (148 F. 2d 857, 865). The district court found that the applicant had exhausted his state remedies, that the questions presented had been ruled upon by the state courts and certiorari denied by this court and that no "extraordinary circumstances were presented of peculiar urgency" which justified the intervention of a federal district court.

A. THE ALLEGATIONS OF THE PETITION FOR WRIT OF HABEAS CORPUS DO NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

The applicant's first contention that the state trial court had no jurisdiction because the allegation of the information as to his prior conviction was not sustained (R. 4-6) was fully considered and rejected by the District Court of Appeal of the State of California, in and for the Fourth Appellate District, in *People* v. *Ekberg*, 94 C. A. 2d 613, 617-618, 211 P. 2d 316, wherein the court stated:

> "The information charged that the appellant had previously, on April 24, 1942, been convicted of a felony, 'Impersonation of a U. S. Officer,' with imprisonment under certain numbers in Leavenworth and Atlanta prisons, and that this judgment had never been reversed or set aside. It is now contended that this charge was not sustained, and that the charge of a former conviction is 'illegal and void' since it developed at the trial that this former judgment had actually been reversed in the case of *Ekberg* v. *United States*, 167 F. 2d 380. When the district attorney attempted to introduce evidence that the appellant had been previously convicted as alleged in the information appellant's counsel stipulated that he was so convicted, and the appellant personally joined in this admission. It was then stipulated that the appellant was, on April 24, 1942, in the United States District Court at Puerto Rico, convicted of the crime of felony, to wit, impersonation of a United States officer; that judgment was pronounced on that date; that the appellant served a term of imprisonment in the United States penitentiary at

Leavenworth and at Atlanta; and 'that said judgment has never since been reversed, annulled or set aside.' An objection to the introduction of evidence to establish these facts was then made on the ground that the facts had already been established, and was sustained. At the close of the appellant's evidence, he himself tried to raise the contention that the case above cited had reversed his conviction. His counsel assured the judge that he had read this case, that there was only a partial reversal for an error in giving consecutive sentences under different counts, that there was nothing at all wrong with one sentence, and that what happened in connection with that reversal had 'not a thing' to do with the issue presented in this case. There is nothing in the case cited which would have the effect here contended for, and the defendant is bound by the stipulations and admissions which were made. It is further contended, in this connection, that the jury should have been advised that the defendant had served an extra period of imprisonment and probation under that former conviction, as was developed after a part of the judgment was reversed. This was not material to any issue here and no error appears in that connection."

A review of the court's decision in *Ekberg* v. *United States*, 167 F. 2d 380, reveals that although one count of a three-count indictment for impersonation of a federal officer (18 U. S. C. A. Sec. 76) was held to be improper, the other two counts of the indictment were held proper and the applicant held to be properly convicted on counts two and three of said indictment.

Since he was merely charged in the state courts with a prior felony conviction of "Impersonation of a U. S. Officer" and the service of sentence in a federal penitentiary, therefore, it is apparent that this was correct and any contention of error in this respect was without merit.

As to the applicant's second contention that the information failed to charge an offense pursuant to the provisions of Sec. 476a of the Penal Code of the State of California and that he was held to answer by the committing magistrate without reasonable or probable cause (R. 6-7), these points were fully covered in the opinion of the District Court of Appeal of the State of California, in and for the Fourth Appellate District, in the decision in *People* v. *Ekberg*, 94 C. A. 2d 613, 615-616. By both this court and the state courts it has long been settled that the writ of habeas corpus cannot be used for the purpose of proceedings in error and that the sufficiency of the evidence to support the conviction may not be inquired into under the writ. (*Sunal* v. *Large*, 332 U. S. 174, 67 S. Ct. 1588; *Frank* v. *Mangum*, 237 U. S. 309, 35 S. Ct. 582; *In re Connor*, 16 C. 2d 701, 108 P. 2d 10; *In re Razutis*, 35 C. 2d 532, 219 P. 2d 15.) Thus it is patent that this contention does not present a substantial federal question.

With relation to the applicant's third contention that he was deprived of counsel of his own choice or that his counsel was incompetent (R. 8-13), this point is negated by the record as well as the petition itself. The applicant did not present this question on

the appeal from the original judgment nor did he at any time during the proceedings in the trial of said matter seek to raise this point. The state courts in reviewing the applicant's record on appeal found that he had a fair trial and affirmed the judgment of the trial court (*People* v. *Ekberg*, 94 C. A. 2d 613, 211 P. 2d 316). The applicant's further contention that he was denied the presence of defense witnesses because of the incompetency of his counsel (R. 10-11) does not constitute a denial of due process of law. The question of the competency or incompetency of his counsel was a question of fact to be passed upon by the courts of the State, which found that the applicant had a fair trial. The federal courts are not charged with a review of the strategy of defense counsel (*Burkett* v. *Mayo* (5 Cir.) 173 F. 2d 574). A defendant is entitled to a fair trial, not a perfect one. His counsel is not required to be infallible (*U. S. ex rel. Feeley* v. *Ragen* (7 Cir.) 155 F. 2d 976). It is only in those cases where the record discloses that counsel for an applicant was so lacking in competence that it amounted to no defense at all and on the failure of a trial judge and prosecuting attorney to observe and correct such conduct would a denial of a fair trial result and hence a denial of due process of law. Clearly, in the instant matter, the applicant has in no manner demonstrated that the circumstances surrounding his trial shocked the conscience of the court and that the proceedings were but a farce and a mockery of justice (23 *C. J. S.* Criminal Law, Sec. 1443; 24 *C. J. S.* Criminal Law, Sec. 1948, p. 1112).

In the light of the decisions of this court, it is apparent that this contention of the applicant does not present a question of substantial importance as to a deprivation of his constitutional rights (*Ex parte Hawk*, 321 U. S. 114, 115-116, 64 S. Ct. 448, 88 L. Ed. 572; *Powell* v. *Alabama*, 287 U. S. 45, 68-70, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527; *Moore* v. *Dempsey*, 261 U. S. 86, 43 S. Ct. 265, 67 L. Ed. 543).

With relation to the applicant's fourth contention—that the joinder of the two separate informations for trial resulted in a denial to him of due process of law (R. T. 14-15), the record discloses that the joinder was made at the applicant's request and he may not attack such joinder on habeas corpus (*People* v. *Ekberg*, 94 C. A. 2d 613, 211 P. 2d 316). The question of joinder is regulated by the law of the State and the Fourteenth Amendment does not control mere forms of procedure in the state courts or regulate the practice therein (*Holden* v. *Hardy*, 169 U. S. 366, 18 S. Ct. 383; *Hurtado* v. *State of California*, 110 U. S. 516, 4 S. Ct. 111; *People* v. *Burton*, 91 C. A. 2d 695, 205 P. 2d 1065 (cert. den. 338 U. S. 886)).

As to the applicant's contention that he was not afforded a probation hearing and that judgment and sentence were improperly imposed (R. 14-15), this point is fully considered in the decision of the district court of appeal in *People* v. *Ekberg*, 94 C. A. 2d 613, 618-619, and a review thereof discloses that it does not present a substantial federal question (*Williams*

v. *New York*, 337 U. S. 241, 93 L. Ed. 1337, 69 S. Ct. 1079).

Applicant's contention that he was denied the right of appeal in that the District Court of Appeal of the State of California did not permit him to orally argue his matter or to appoint counsel to argue this matter for him (R. 15-16) clearly does not present a substantial federal question. The assistance of counsel on appeal or the right of an appellant to be personally present and argue the matter is a question within the discretion of the appellate court and an appellant as a matter of right is not entitled to be produced. The refusal of this right does not involve a lack of due process of law or present a substantial federal question (*Price* v. *Johnson*, 334 U. S. 266, 68 S. Ct. 1049, 92 L. Ed. 1356; Annotation, 19 A. L. R. 2d 789, 822-823).

Thus petitioners herein submit that the petition for writ of habeas corpus disclosed a lack of a substantial federal question and the action of the district court in denying applicant the right to file such petition in forma pauperis did not constitute an abuse of its discretion or support the finding by the Ninth Circuit Court of Appeals that the district court should further consider the matter.

B. NO CIRCUMSTANCES OF PECULIAR URGENCY ARE DISCLOSED BY SAID PETITION FOR WRIT OF HABEAS CORPUS

In the case at bar as appears from the record before the district court, the applicant was given a fair trial in the state courts. His case was fully reviewed on

appeal from the original judgment (*People* v. *Ekberg*, 94 C. A. 2d 613, 211 P. 2d 316). In his petition for writ of habeas corpus presented to the California Supreme Court (Crim. 5086) the same points as were sought to be raised in the petition in the Federal District Court were presented to the State Supreme Court. That court denied the petition for writ of habeas corpus without opinion and this court denied certiorari (*Ekberg* v. *California*, 339 U. S. 969, 94 L. Ed. 1377, 70 S. Ct. 986).

We are not confronted in this case with the use of a forced confession, denial of counsel to an accused and thus no opportunity to protect his rights, the use of perjured testimony knowingly by the prosecution in order to obtain a conviction, a conviction occurring under the influence of a mob spirit or community coercion. The applicant's petition merely presents matters which could and should have been presented to the state courts on the trial and appeal from the original judgments.

The Supreme Court of the State of California had the matters presented to them on a petition for a hearing after decision by the district court of appeal in *People* v. *Ekberg*, 94 C. A. 2d 613, 211 P. 2d 316, and again on the petition for writ of habeas corpus, Crim. 5086. In neither case did the Supreme Court find such error in the record as would warrant their

taking jurisdiction of the matter. Patently, on the record before the district court and the prior state court record it may not be said that such a gross violation of the applicant's constitutional rights occurred as would warrant a federal court finding that there was a lack of "due process" in the state proceedings theretofore had so as to deny the applicant the substance of a fair trial and thus oust the state court of jurisdiction to impose the sentence. It may not be successfully urged in the case at bar that the applicant was not present in the state court and convicted of crime after having been fairly apprised of the charges against him and after a fair trial in accordance with constitutional procedural safeguards (*Collins* v. *Frisbie*, 342 U. S. ____, 96 L. Ed. Adv. 396).

Thus it would appear that the dissenting opinion of Circuit Judge Healy to the effect that the petition for the writ presented no question of substance as most of the points raised had been fully considered by the California courts and their lack of merit exposed and in respect of points not urged on the direct appeal that there was no substantial showing of the denial of a federal right, is clearly borne out by the record and the majority opinion which is contrary thereto is erroneous and should be reversed (*Ekberg* v. *McGee*, 191 F. 2d 625, 194 F. 2d 178).

II. The Decision of The Ninth Circuit Court of Appeals Is Not in Accord With the Rationale of Darr v. Burford, 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761; Ex Parte Hawk, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572; or 28 U. S. C. 2254

The ninth circuit court in reaching the majority opinion in this case interpreted Section 2254, Title 28 U. S. C. which reads, in part:

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, *or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.*" (Emphasis supplied.)

so that the italicized alternatives after the word "or" have no application, where, as here, there is an effective state remedy of which the applicant has availed himself. The court further states that the language of *Ex parte Hawk*, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572, that the writ is available in the federal courts only "in rare cases" presenting "exceptional circumstances of peculiar urgency" is inapplicable to a case in which the petitioner has exhausted his state remedies, and in which he makes a substantial showing of a denial of federal right and that *Darr* v. *Burford*, 339 U. S. 200, 211, 70 S. Ct. 587, 94 L. Ed. 761, so recognizes.

This court in neither the cases of *Darr* v. *Burford*, 339 U. S. 200, or *Ex parte Hawk*, 321 U. S. 114, adopted the rationale that after exhaustion of state remedies by a petitioner seeking a writ of habeas corpus from a federal district court to review the validity of his custody under a state judgment, a federal district court *must* entertain such petition. Under the majority opinion of this court in the *Darr* case, the federal district judge has the discretion to review such petition and dismiss it where on its face no substantial federal question is presented and no extraordinary circumstances of peculiar urgency are disclosed.

> *United States ex rel. Kennedy* v. *Tyler*, 269 U. S. 13, 17; 46 S. Ct. 1, 3; 70 L. Ed. 138.

In *Darr* v. *Burford*, 339 U. S. 200, at 214, this court stated:

> "On that application, the court may require a showing of the record and action on prior applications, and may decline to examine further into the merits because they have already been decided against the petitioner. Thus there is avoided abuse of the writ by repeated attempts to secure a hearing on frivolous grounds, and repeated adjudications of the same issues by courts of coordinate powers."

In the case at bar the district court after an examination of the application and the prior proceedings of which it could take judicial notice (*U. S. ex rel Wing* v. *Com.* (D. C. Pa. 1950), 90 F. Supp. 208;

Knight v. *People*, 60 F. Supp. 164) found that the applicant had not alleged exceptional circumstances of peculiar urgency which would tend to show that notwithstanding the strong presumption of constitutional regularity in state judicial proceedings that the prosecution by the State in his case so departed from constitutional requirements as to justify a federal court's intervention to protect his rights.

If we adopt the reasoning of the ninth circuit court opinion in the case at bar, we compel federal district courts to fully consider every petition for habeas corpus presented by applicants in state custody under state judgments who have alleged exhaustion of state remedies, regardless of the merit of the contentions urged. We must therefore assume that the states, which have the major responsibility for the maintenance of law and order within their borders, have failed to maintain their role as guardians of the administration of justice. This assumption is not in accord with the principles of *Ex parte Hawk*, 321 U. S. 114, or *Darr* v. *Burford*, 339 U. S. 200, at 217, where this court stated:

> "It is this Court's conviction that orderly federal procedure under our dual system of government demands that the state's highest courts should ordinarily be subject to reversal only by this Court and that a state's system for the administration of justice should be condemned as constitutionally inadequate only by this Court."

Where, as here, the merits of a petitioner's application have been considered by the state courts and

certiorari denied by this court, due respect for the delicacies of the relationship between the United States and its courts and the states and theirs would require the federal courts to withhold relief in state custody cases until it is made to appear that the state has not afforded a constitutionally adequate opportunity to prove the factual basis for a constitutional contention unless "exceptional circumstances of peculiar urgency are shown to exist."

The area of judicial discretion vested in the district courts after state remedies have been exhausted should be limited to the evaluation of the urgency of any exceptional circumstances which may be present in a particular case. It would be intolerable that a federal district court should release a prisoner on habeas corpus after the state courts have refused him relief in precisely the same case on a similar writ and this court has denied a review of their action on certiorari. This would permit a federal district court to review not only the decisions of the highest state courts but also of this court as a matter of course. The reasoning adopted by the Ninth Circuit Court of Appeals is contrary to that adopted by the courts of the second and fourth circuits on similar problems (*Adkins* v. *Smith* (4 Cir.), 188 F. 2d 452; *Schechtman* v. *Foster* (2 Cir.), 172 F. 2d 339 (cert. den. 339 U. S. 924, 70 S. Ct. 613, 94 L. Ed. 1346); *Goodman* v. *Swenson* (4 Cir.), 173 F. 2d 349).

Chief Judge John J. Parker, of the Court of Appeals for the Fourth Circuit, who served as Chairman of the Judicial Conference of Senior Circuit Judges, Committee on Habeas Corpus, the recommendations of which committee ultimately were enacted into law by Congress, discusses Section 2254 in his article "Limiting the Abuse of Habeas Corpus" 8 Fed. Rules Dec. 171-178 (1948), and states:

> "The effect of this last provision is to eliminate, for all practical purposes, the right to apply to the lower federal courts in all states in which successive applications may be made for habeas corpus to the state courts; for in all such states, the applicant has the right, notwithstanding the denial of prior applications, to apply again to the state courts for habeas corpus and to have action upon such later application reviewed by the Supreme Court of the United States on application for certiorari.
>
> "The thing in mind in the drafting of this section was to provide that review of state court action be had so far as possible only by the Supreme Court of the United States, whose review of such action has historical basis, and that review not be had by the lower federal courts, whose exercise of such power is unseemly and likely to breed dangerous conflicts of jurisdiction."

The Ninth Circuit Court of Appeals in its amended opinion of January 30, 1952 (*Ekberg* v. *McGee*, 194 F. 2d 178), at page 180, stated:

> "The appellee also contends that appellant has not exhausted his state remedies because under the California Law a decision on a petition for the

writ of habeas corpus is not res judicata of the issues raised by the petition and hence successive petitions may be filed making the state process inexhaustible. We do not agree that in California the process is inexhaustible. The contrary is decided in Re Horowitz, 33 Cal. 2d 534, 547, 203 P. 2d 513, and in Re Browning, 99 Cal. App. 2d 337, 221 P. 2d 736."

In the case of *In re Horowitz*, 33 Cal. 2d 534, 203 P. 2d 513, in which an application for a writ of habeas corpus was consolidated with an appeal from an order denying a petition for writ of error coram nobis, it appeared that the petitioner had previously taken an appeal from the judgments of conviction and the appellate court affirmed these judgments (*People* v. *Horowitz*, 70 C. A. 2d 675, 161 P. 2d 833). His petitions for rehearing and hearing by the supreme court were denied. The applicant then petitioned the Los Angeles Superior Court for a writ of habeas corpus and writ of error coram nobis. The superior court issued the writ of habeas corpus and after a hearing discharged the writ and denied the petition for coram nobis. His appeal from the denial of the writ of error coram nobis was dismissed. Petitioner then applied to the California Supreme Court for a writ of habeas corpus. This was denied without opinion. Then the action resulting in the cited decision was instituted based primarily on the same grounds as the previous proceedings, namely, the contention that the prosecution used false and perjured evidence with knowledge of its character to procure the petitioner's conviction.

The California Supreme Court in discharging the writ of habeas corpus, stated: (33 C. 2d 534, at 546)

> "Furthermore, certain grounds of the petition were presented by the previous application to this court for habeas corpus, and it appears that all grounds now urged were then known to petitioner. It is the policy of this court to deny an application for habeas corpus which is based upon grounds urged in a prior petition which has been denied, where there is shown no change in the facts or the law substantially affecting the rights of the petitioner. (*In re Miller* (1941), 17 Cal. 2d 734, 735 (112 P. 2d 10); *In re De La Roi* (1946), 28 Cal. 2d 264, 275 (169 P. 2d 363).) And as to the presentation of new grounds based on matters known to the petitioner at the time of previous attacks upon the judgment, in *In re Drew* (1922), 188 Cal. 717, 722 (207 P. 249), it was pointed out that the applicant for habeas corpus 'not only had his day in court to attack the validity of this judgment, but . . . had several such days, on each of which he could have urged this objection, but did not do so'; it was held that 'The petitioner cannot be allowed to present his reasons against the validity of the judgment against him piecemeal by successive proceedings for the same general purpose.'"

The case of *In re Browning*, 99 C. A. 2d 337, 221 P. 2d 736, merely held that the judgment of the superior court discharging a petition for writ of habeas corpus to secure custody of a minor is res judicata in a subsequent habeas corpus proceeding in the district court of appeal in which no new or additional facts are presented.

Neither of these cases, however, compels the conclusion that an applicant may not file successive applications for writs of habeas corpus in the state courts. In the case of *In re Swain,* 34 C. 2d 300, 209 P. 2d 793, the California Supreme Court in denying a petition for writ of habeas corpus to secure the release of a prisoner from custody where the petitioner had previously unsuccessfully sought three writs in the state courts, three in the federal district courts, and two petitions for writ of certiorari in this court, stated:

> "It should be noted that no question of the abuse of the writ of habeas corpus is before us (*cf., Price* v. *Johnston* (1947), 334 U. S. 266, 286 (68 S. Ct. 1049, 92 L. Ed. 1356)), and that our determination that the vague, conclusionary allegations of the present petition are insufficient to warrant issuance of the writ is not a ruling on the merits of the issues which petitioner has attempted to raise (*cf., Pyle* v. *Kansas* (1942), 317 U. S. 213, 216 (63 S. Ct. 177, 87 L. Ed. 214); *Williams* v. *Kaiser* (1944), 323 U. S. 471 (65 S. Ct. 363, 89 L. Ed. 398); *Tompkins* v. *Missouri* (1944), 323 U. S. 485 (65 S. Ct. 370, 89 L. Ed. 407); *Rice* v. *Olson* (1944), 224 U. S. 786 (65 S. Ct. 989, 89 L. Ed. 1367)). We are entitled to and we do require of a convicted defendant that he allege with particularity the facts upon which he would have a final judgment overturned and that he fully disclose his reasons for delaying in the presentation of those facts. This procedural requirement does not place upon an indigent prisoner who seeks to raise questions of the denial of fundamental rights in propria

> persona any burden of complying with technicalities; it simply demands of him a measure of frankness in disclosing his factual situation.
>
> "The application for the writ is denied without prejudice to the filing of a new petition which shall meet the requirements above specified."

There is no question that even under the California cases cited in the opinion of the Ninth Circuit Court of Appeals that if there is any change of facts or law affecting an applicant's case since the filing of his previous application for a writ of habeas corpus he would be entitled to bring the matter again before the California courts (*In re Horowitz*, 33 C. 2d 534, 203 P. 2d 513). It is not a question of res judicata but an abusive use of the writ of habeas corpus which is frowned on by the California courts.

Thus petitioner herein submits that the action taken by the Ninth Circuit Court of Appeals in the instant matter is based upon fallacious reasoning and fails to accord to Section 2254, Title 28 U. S. C., the interpretation meant to be given by the draftsmen thereof and also fails to recognize the principle of comity enunciated by this court in *Ex parte Hawk*, 321 U. S. 114, and *Darr* v. *Burford*, 339 U. S. 200.

III. The Ninth Circuit Court of Appeals by Its Decision Has Refused to Give Any Weight to the Denial of Certiorari by This Court of the Highest State Court's Decision in the Same Matter

The decision of the Ninth Circuit Court of Appeals in the case at bar points out that the applicant has

presented the same points sought to be raised in the instant petition addressed to the federal district court as were before the state courts and this court when his petition for certiorari was denied. While this court has many times stated that the denial of a petition for certiorari is not an adjudication upon the merits of a case (*Maryland* v. *Baltimore Radio Show*, 338 U. S. 912, 917; *United States* v. *Carver*, 260 U. S. 482, 490), nevertheless these cases did not involve the question of exhaustion of state remedies for purposes of seeking writs of habeas corpus from lower federal courts. In *Darr* v. *Burford*, 339 U. S. 200, this question was unanswered. In the present case the issue is squarely presented.

If review upon certiorari by this court is to be considered as an integral part of the state procedure for exhaustion of state remedies, then some weight should be given to the fact that this court after an examination into the substance of a prisoner's protest against unconstitutional detention did not find existent such circumstances showing a gross violation of the applicant's constitutional rights.

This court stated in *Ex parte Hawk*, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572:

> "Where the state courts have considered and adjudicated the merits of his contentions, and this Court has either reviewed or declined to review the state court's decision, a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated."

This language has been cited by the various circuit courts. Some have given the denial of certiorari conclusive effect, others have given the denial discretionary weight and in other instances no substantive weight whatsoever has been given (46 Illinois Law Review 478-488).

The ninth circuit court in the *Ekberg* case has given the denial of certiorari no weight whatsoever, contrary to its position taken in the case of *Tate* v. *Heinze*, 187 F. 2d 98. Clearly, the adoption of this viewpoint would set at nought this court's determination in the very case that the local system for the administration of justice squares with federal constitutional requirements. This would render meaningless the requirement of this court that exhaustion of state remedies requires an application for certiorari to this court and permit a federal district court to consider anew without the existence of any extraordinary circumstances the same matters that have hitherto been presented to the highest state courts and the highest court of the United States. This viewpoint would not be according "due process" to the states.

CONCLUSION

Petitioners respectfully urge that this court reverse the decision of the Ninth Circuit Court of Appeals in this matter by establishing a criterion for district courts to follow in cases where, as here, a petition for writ of habeas corpus on its face does not disclose a substantial federal question or circumstances of

peculiar urgency but where the petition merely alleges an exhaustion of state remedies.

The decision of the Ninth Circuit Court of Appeals in the instant matter fails to recognize that upon habeas corpus in a federal court, the court does not review the decision of the state courts. The writ is limited to the assertion of the applicant's rights under the Fourteenth Amendment and due process of law does not require infallible process of law. Where, as here, the state courts have honestly applied the pertinent doctrines to the best of their ability, they have accorded to an accused his constitutional rights. Patently, where on the face of his petition for writ of habeas corpus an applicant does not present a substantial federal question or extraordinary circumstances of peculiar urgency after showing an exhaustion of state remedies, a federal district court should be allowed the discretion to deny such petition without entertaining further proceedings in the matter.

The course adopted by the decision of the Ninth Circuit Court of Appeals would place upon the federal district courts—such as that in the Northern District of California, where two state prisons are located containing some thousands of inmates who have discarded the former idea of escape through "jail break" for the modern approach through petitions for writs of habeas corpus—a tremendous burden which would not assist in the orderly administration of justice but which, on the contrary, would impede it.

Persistence in the reasoning contained in the opinion under review would reduce the highest appellate courts of the State of California to an intermediate court subject to the appellate supervision and control of the judges of the United States district courts in every case. We submit that in the organization of the dual state and federal system such a situation was never contemplated.

The writers of this brief have never been accused of being dervishes whirling before the shrine of state's rights and we are not now basing our argument on any attenuated theory of the supremacy of the state judicial systems.

All we ask or contend for is that after a decision of the highest state tribunal has been subjected to review by this court and relief has been denied without opinion, further review by the district courts shall not be available except where the state appellate process is inadequate or extraordinary circumstances intervene to compel action by the district court.

For the reasons stated, it is respectfully submitted that the judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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